general ethics be such as to furnish a solid foundation for our economics; and that our economics have an obvious and salutary bearing on the realities of the workshop and the home.

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THE RESPONSIBILITIES OF THE LAWYER.*

IT is a noticeable thing that the principles which determine the lawyer's duties and responsibilities are, in some important respects, unsettled. The essential character of his profession is not so fixed as to determine definitely his place in the social arrangements. What the physician stands for, or the clergyman, or the teacher, or the soldier, is pretty clearly agreed on, not to mention occupations of which the range is less wide. Each man in those callings has a tolerably definite place, specific things are expected of him, and he knows what they are. But the lawyer not only finds himself enlisted in very various and miscellaneous activities, which do not combine into a coherent whole, and which expose him to indefinite demands, but he discovers that there is an inherent uncertainty about the function which he has assumed.

The office of the advocate, old as it is, and so constitutional a part of the system of things that we cannot see how civilization could dispense with it, is still so indefinite in character, so loosely fitted in so large a place, that it is a matter of wide difference and dispute what the advocate must do, should do, or may do, in many situations—what society expects of him, what his client may require of him, what obligations morals impose on him.

The truth is that there is something essentially paradoxical in the advocate's position. He stands at the bar, in theory,

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demanding justice—that is, asking to have strict principles of right strictly applied. This is simple to the point of severity. And yet he is holding himself out, at least in popular estimation (which is not wholly wrong), as ready to take any case of any man who will pay him for it, and to do his best to make that case prevail. It cannot be denied that this seems to involve a formidable inconsistency, and the best evidence that the situation is not wholly easy is that lawyers who think about it seldom shake themselves quite free from a sense of walking in rather a strait path. Not that they have a sense of wrong-doing, or even the embarrassment of being at any moment in an equivocal position, but they have a cautious feeling that they must look well about them lest they find themselves there. They are constantly exercising their minds and consciences on the question how far it is proper to push their client's cause in this or that direction with judge, jury, witnesses, or opposing counsel, and are constantly passing similar judgments on other lawyers. Very many lawyers, as well as moralists, have left on record their contributions to the discussion of the lawyer's obligation to an unworthy cause, and this question is so well recognized as still open and as a source of embarrassment that it is plain that the advocate's duties have not been determined to a point where the practitioner can feel sure of his ground in such a case. I do not mean that the advocate's work is necessarily of doubtful morality, in the sense that it is done only under a strain of conscience. On the contrary, it is one of my purposes to maintain, in this paper, that the constant exercise of the moral judgment on these questions is a proper use and healthful training of the moral sense. I am but insisting that the advocate's position is essentially one of conflicting obligations not easily adjusted.

I say that lawyers themselves are sensible of the inherent difficulty of the advocate's position. Perhaps the more significant question is, what does the non-professional world think of it? The lawyer himself usually settles down into a practical working adjustment of his business to his conscience, or of his conscience to his business, as the case may be, and

gives himself little trouble about formulating his professional relations and obligations. If he is sensitive he continues, as I have said, to feel the delicacy of his task, but he is scrupulous, and takes care to keep well on the honorable side of things. In all this, however, he is necessarily much controlled by the general professional opinion and habit in which he lives and moves. Lawyers, like all men who are part of a specially organized society, live in an atmosphere of their own, full of understandings, allowances, things taken for granted and too plain to question. But it is often these very things, the postulates of the whole professional position, which are questioned by the outsider. The clergyman, moving about in his spiritual world more real to him than the world of sense, is often staggered by finding his fundamental assumptions received, not perhaps as false, but as unrealities, out of place in an actual universe. So the lawyer, at home in an artificial system, governed by traditional judgments and supported by a pervasive sense of the agreement of his fellows, accepts some things as underlying his world which may seem to other men to be much in need of explanation.

To get at, then, the real character of the lawyer's office and settle what should be expected of him, it is well to ask what the non-professional world thinks of him and his work. I do not mean to attend to the invective, ridicule, and suspicion which literature, the drama, and the vulgar speech of men have for generations, on occasion, poured out on the profession of the law. I am inclined to say of this that as it has been mainly directed against those who abuse the profession, it has probably been, on the whole, deserved, for the profession has been abused, and is abused, beyond all possible apology. What I mean to consider is the judgment of thinking men about the essential character of advocacy. What do they think of it as a profession?

To laymen the advocate's position is, I believe, the occasion of much doubt and question. How to reconcile with the plainest requirements of sincerity, not to say common honesty, this readiness to take up any cause remains to them a puzzle in spite of explanations. They may not bluntly ques-

tion the lawyer's character as an honest man: facts are too plain for that, and they are accustomed themselves in their own needs to rely upon that character. But all the more they are curious to understand a mental and moral attitude which seems to involve such contradictions.

Jeremy Bentham, in his treatise on a "Constitutional Code," refers to a passage in Homer where Menelaus, courteously addressing a stranger, seeks to learn his occupation, and asks him what his business may be, whether by chance it is that of a pirate or what other. Bentham justly remarks on the singular state of society in which such a question could be put without either the intention or the danger of giving offence, and he goes on to find a parallel in modern society in a passage which I quote:

> "You are of the Bar, sir, if I do not mistake, is a question which nowadays in England or the United States a gentleman may, with as little fear of giving offence, put to any other gentleman. That is to say, the indiscriminate defence of right and wrong, and that for hire, is your occupation; and for the purpose of that occupation falsehood—self-conscious falsehood—is an instrument which, without stint and without scruple, you are in the constant habit of employing."

One certainly would not go to Bentham for an unbiased judgment of the legal profession, and this attack may be dismissed as too violent and too false to be treated seriously; but it puts, with a coarse plainness, what is, I am sure, in the minds of the public the essentially perplexing thing about the advocate's position. That it is perplexing could be established by abundant quotation, and still more by the allusions, the intimations, and the tone of literature and common speech. If any one doubt it he can satisfy himself, I think, by interrogating thoughtful men and women anywhere. If, then, the office of the advocate occasion such persistent questions from the public, and some sense of difficulty and delicacy on the part of those who practise it thoughtfully, I trust that I may venture to-night to discuss some aspects of that office without a risk of finding your minds too settled to entertain the subject. To attempt to consider, in any detail, the lawyer's duties is of course out of the question here. It may be worth while, however, to discuss in general his place and function

with the effort to determine a little more definitely what responsibility he is under.

We have an accepted theory of the lawyer's place in the administration of justice which stands, and on the whole rightly, as a sufficient explanation and justification of his general position, though it is relied on to clear him of responsibility to a degree to which, perhaps, he is hardly entitled.

It is our familiar theory of practice under the common law system that the advocate's function is solely to present one side of a case. He is to bring forward such facts and arguments as may be properly presented for his client, leaving it to the opposing counsel to do the same for his side, and to the judge to weigh the conflicting claims and decide between them. When laymen ask, as laymen always have asked and always will, how an honest lawyer can maintain a bad cause, this theory is explained to them, and it is pointed out that it is the right of every man to have the law fairly applied in his case, and to have the assistance of counsel for that purpose.

This is correct as far as it goes, and if it covered the situation as completely as it appears to, the lawyer's place in the system would be comparatively plain. It seems to picture him as a spokesman, perfunctorily in the case, detached from selfish interest in it, and occupied only in presenting in proper form ascertained facts and principles of law; and it assumes, too, that the decision may be safely left to an impartial judge who is so able and so disposed to get the truth that no exaggeration or error of counsel affects him. In such a system the lawyer seems to be left with substantially no responsibility for the decision of his case.

But both of the assumptions which are made in this theory are essential. Change the counsel into something different from a disinterested spokesman, or make the judge either incompetent or partial so that he may be warped by the efforts of counsel, and you have a very different system.

Now, in fact, the lawyer, under present arrangements, is far from being merely an official intermediary, whose function is simply to expound principles of law, or to act as a mouthpiece for those who cannot speak for themselves. He is, on

the contrary, frequently the intimate and confidential adviser of the client, consulted often at every stage of the business, suggesting every step after he has once been called in, seeing, and perhaps drawing, every paper and every letter, having interviews with opposing parties, carrying on negotiations, and participating in and directing the situations which are to be called in question in the trial of the case. When litigation has begun he talks with witnesses, and decides what evidence to use and how to use it. When he appears in court he may have become so identified with the case that he is virtually his own client, and moreover the assurance of his own fee, or the size of it, may have an unexpressed but very real dependence on success. Whether things go as far as this or not, the lawyer usually has been close to his client, and has had those intimate conferences in which, unavoidably, the chances of success are discussed, hopes and fears have risen and fallen with his intimations, and he often stands before the court and jury only a little less interested, solicitous, and committed than the client who sits by his side. Of course, in some cases the lawyer is not so identified with his client, and when engaged to try a case begun by others he may be much further removed, but even then his relation to his client is generally close and his absorption and interest pretty complete.

Such being the lawyer's immersion in his client's cause, it is out of the question to consider him merely as a perfunctory representative. His responsibility for litigation in its inception, its progress, and its results, must be, to some extent at least, commensurate with his identification with the cause. If he wholly adopts the client, he must acknowledge the relationship.

This leaves the lawyer's responsibility where he chooses to put it. He may limit it by limiting his relations to those external services which are guardedly professional; he may, on the other hand, enter so far into the case as to become as answerable for it as the client is, or even more.

This is, I think, the position which the lawyer must accept. He cannot make a case his own, and push it as if he were a party, and yet disclaim responsibility for it on the ground

that his connection with it is purely official. He must openly accept the consequences of whatever he does, and expect no shelter from any theory of the professional relation which does not squarely recognize all the facts.

I did not mean to imply that the lawyer's relations to his client wholly lack the elements which we are accustomed to think of as characteristic of the profession, the elements, that is, of quasi-authority and discretion, which attach of right to expert knowledge, and the independence which enables the adviser to direct, without seeming to incur responsibility for results which he does not profess to insure. In spite of nearness to the client the lawyer still may be, and certainly should be, in a position very different from that of a non-professional person employed. He need never become a partner in his client's fortunes, and he may insist on keeping, in greater or less degree, that detachment which is hardly less necessary for the lawyer than for the physician, and which keeps the professional adviser outside as well as inside the range of sympathy with the person to be assisted. At the same time we must recognize the fact that the aloofness which we may like to associate with the lawyer's attitude towards his client is usually little sustained, and it cannot be considered to be, in any great degree, an essential part of the lawyer's habit.

I have spoken of the lawyer's position as we know it here, in America. I do not know whether the lawyer is farther removed from identification with his client under the English system which separates the barrister's work sharply from the solicitor's and which still keeps up, perhaps with some difficulty, the fiction that the barrister is unpaid except by a complimentary offering. In the case of Ryves *vs.* The Attorney-General, where Mrs. Ryves tried to establish her claims to royal descent, Dr. Smith, her counsel, in addressing the jury, began to say that "on his honor he believed his client's case to be well founded," when, as the report states, "the Lord Chief Justice [Lord Cockburn] interposed peremptorily and said he could not allow the learned counsel to pledge his honor on his own belief. To do so were a violation of the rules of the profession, and a dishonor to counsel." Dr. Smith apolo-

gized. I think that such a statement from counsel here would be considered as in extremely bad form. Whether it would be rebuked by the court, *sua sponte*, I am not sure.

It may be that the English barrister is less disturbed by interest in his client than is the American lawyer. But it is also quite possible that the professional desire for victory, the stimulus of public observation, and the competition of a crowded profession where success will always seem a necessity, may carry counsel to quite as great lengths as devotion to their clients, and be, on the whole, no more creditable to counsel or serviceable to justice.

So much for the assumption that the lawyer's place is that of an official spokesman. The other assumption, that he is presenting a case before a tribunal competent and impartial, on whom he is entitled to put the responsibility for results, remains to be considered.

The influence of powerful counsel on courts, and the unequal chances of success which follow from this alone, irrespective of the merits of a cause, are so far a result of that partiality in distributing talents for which nature is responsible that it can hardly be considered as any other than an unavoidable disturbance in the cause of justice. That it is often a powerful, and almost irresistible, disturbance every one knows who has seen overmastering legal talents matched against ignorance or mediocrity. Judge Curtis, in his address on presenting to the Supreme Judicial Court of Massachusetts the resolutions of the Suffolk Bar on the death of Rufus Choate, felt compelled, even at that moment, to notice the charge that from Mr. Choate's lips "with fatal sweetness elocution flowed." After summing up, in a happy expression, the advocate's obligation as the duty "to manifest and enforce all the elements of justice, truth, and law which exist on one side, and to take care that no false appearance of those great realities are exhibited on the other," Judge Curtis added this guarded remark: "If from eloquence, and learning, and skill, and laborious preparation, and ceaseless vigilance, so pre-eminent as in Mr. Choate, there might seem to be danger that the scales might incline to the wrong side, some compen-

sation would be made by the increased exertion to which the seeming danger would naturally incite his opponents." But the expectation that an ordinary practitioner would be stimulated by the spectacle of Mr. Choate's overwhelming power to rise to an equal height, assumes reserves of talent of which average men are hardly conscious.

It must be admitted that the possession of power with the court imposes a serious responsibility on those who have it, and they can less escape than other men the responsibility for results to which they have contributed so much more by their efforts.

But so far as courts are concerned the danger of influence is comparatively slight. With the judges of fact, however, the jury, the situation is very different. The advocate who is presenting his case to a jury is frequently, if not usually, before a tribunal which he knows is neither competent to weigh evidence properly, nor disposed to do so impartially. It is, on the contrary, so notoriously limited in its comprehension, especially of complicated or unfamiliar facts, and above all so subject to prejudice and so influenced by irrelevant appeals, that skill in managing its unreasonable impulses is often a chief reliance of those who practise before it with the greatest success.

This is, let us admit it, a dangerous spot in our administration of justice. Juries are no doubt worse in some places than in others, but in many great cities that must come near to being true which a distinguished judge lately said to me, in speaking of a system where resort to a jury is optional in civil cases: "No one seeks a jury who does not hope for prejudice."

It is impossible, then, for any lawyer who is submitting a case to such a tribunal to pretend that he is free to urge his cause without responsibility for results, on the ground that they are wholly in the hands of judges to whom society has left the task of correcting his one-sided efforts. It must be acknowledged, on the contrary, that in proportion as the lawyer purposely carries a jury against the facts, or beyond the facts, so far the verdict is his act. To that responsibility he must be held.

Such then is our system as it actually is. It is one where counsel are zealously committed to, and often identified with, one side, and where the judges of fact are limited in their ability to grasp facts, exposed to prejudice, and much influenced by counsel skilful in leading them. These conditions greatly affect the advocate's duties and responsibilities as one concerned in the administration of justice. They leave him in the open field of every-day responsibility, unsheltered by any professional immunity, and answerable to public judgment for whatever he does, or tries to do, for his client.

So much in general for the position of the advocate. What particular duties and responsibilities attach to his position I do not mean to try to discuss in detail. There are, however, one or two points to which I should like to allude; and first to a question which lies at the threshold of the lawyer's employment, the question how far he is under obligation to hold himself ready to enter any man's service in any case.

There is hanging about the profession a more or less undefined and foggy impression that there is such an obligation. It half appears to belong to the lawyer's office to be ready to spring to the relief of any one who wants his services, and it is rather assumed that his presence in any case is in response to such a call of duty. This lends an air of chivalry which it may be a pity to dispel, but, in my opinion, no such obligation exists. I suspect that it has been assumed, in so far as it is assumed, as a part of that general theory respecting the lawyer as an officer of the court which, if I am right in what I have said, is pretty much overborne, or at least greatly modified, by facts. I suspect, too, that it is now doing more harm as an excuse for lawyers who find themselves in positions where they are not comfortable than it can do good as a call to duty.

However this may be, anything like a general duty to accept any case is not only impossible because the law is now so specialized that the lawyer is often entirely unprepared to go outside of a given range of work, but it is also wholly inconsistent with the position which the profession has taken about its fees. No one can question that professional prin-

ciples do not, in general, require the lawyer to work without pay, or pay which he considers satisfactory. If this is so there is an end of the theory of obligation, purely by virtue of the lawyer's office. It can hardly be that the obligation is to help only well-to-do persons. If the lawyer may decline, without violating professional principles, because he does not see where his pay is coming from, he may as well decline because of other engagements more congenial, or from want of time, or whatever excuse is at hand. So, in fact, lawyers do constantly decline such cases as they do not want. The fact may as well be faced that a lawyer is usually in a case because he chooses to be in it. There are, of course, exceptional cases where services may be required. The court may in theory assign any lawyer to the defence of a criminal, though this is not very frequently done, and certainly cannot be said to impose an obligation with which the lawyer in ordinary practice concerns himself. There are, too, countless cases of hardship which a lawyer of any feeling cannot turn away, but these rather appeal to private conscience than depend upon any settled professional code, and they stand like all other appeals of humanity. That such cases seldom want professional assistance is due rather to the character of lawyers, and a high idea of the moral demands of the profession, than to any hard and fast rule of professional duty. As a principle of professional conduct to which the lawyer is bound by his office it cannot be said that there is any obligation to accept work unless he is disposed to.

It may be said that if the lawyer is not under this obligation society has not the services of the profession to the degree that it supposed it had; that on this theory the accused criminal may be sent from door to door unable to find any lawyer who will defend him, and the wronged man may see his property enjoyed by the oppressor, unable to find any one to take his cause. If it should happen that by reason of poverty, or an unpopular cause, any one, however mean, should find himself helpless in a court of justice, that would certainly be a reproach to the profession which could help him. But the obligation to take such a case would not be one which

rested on the lawyer as a duty peculiar to his profession, but would be only an instance of the moral obligation which lies on all men to help where they can. And certainly society seems in no danger of suffering for want of lawyers to take cases. The danger at present is rather on the other side, and is from that class of lawyers, despised by the profession, whose practice is to hunt for the man with a sensational case or a desperate claim, and the case of a poor man against a rich opponent is not likely to be overlooked.

But whatever the effect of the fact, if it be a fact it must be faced; and it must be admitted that the general duty to take any case, on request of any man, is not among the acknowledged obligations of the profession.

If, then, this idea, still half-cherished, half-doubted, is abandoned, what is the effect on the lawyer's relation to his client?

In the first place, the lawyer, being understood to have taken a case from choice, is in a considerable measure responsible for that choice. It is not, at all events, open to him to stop all questions simply by saying, "I am here because I am retained." This brings with it a responsibility to the court and the public somewhat greater, perhaps, than is always recognized. If the lawyer is understood to ask, whenever a case is brought to him, the question, "Shall I take this case?"—and that is exactly what he does do more or less explicitly—then he is forced to some examination of it, and to take it involves a measure of accountability. The lawyer consents to identify himself, to some extent, with this client in this case. It may not be a case of the kind which he prefers, and many things beside the attractiveness of the work may influence him, for all lawyers at times take cases which they would like to shirk. But still it is wholly a voluntary matter, and the lawyer must accept responsibility for this as for his other decisions in the affairs of life. He cannot stand behind any rule of uniform and unquestionable duty, but must answer for it that he is in the case at all. This responsibility, however, it is to be noticed, is light or heavy according to what is done after one is in the case. It can hardly be embarrassing to be in any case—at least for a defendant—if the activity is con-

fined to securing a proper observance of the substance and forms of law. Beyond that every one is answerable, and should be answerable, for the kind and the degree of his zeal.

Of course, there enters into this question of accepting a case that necessary uncertainty, for which laymen seldom make sufficient allowance, as to what is the actual merit of the case, and a lawyer is not under obligation to settle all his doubts against his client. A case which reaches the point of trial is pretty sure, if it has been in the hands of reputable counsel, to be a two-sided case, however plain it may seem after it has been decided. Boswell relates that he asked Dr. Johnson whether he did not think, as a moralist, that the practice of the law in some degree hurt the nice feeling of honesty, and, in particular, what he thought of supporting a cause which one knows to be bad.

"Sir," said Dr. Johnson, "you do not know it to be good or bad till the judge determines it. I have said that you are to state facts fairly; so that your thinking, or what you call knowing, a cause to be bad must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, sir, that is not enough. An argument which does not convince yourself may convince the judge to whom you urge it; and if it does convince him, why, sir, you are wrong and he is right. It is his business to judge; and you are not to be confident in your own opinion that a case is bad, but to say all you can for your client, and then hear the judge's opinion.

Boswell: "But, sir, does not affecting a warmth when you have no warmth, and appearing to be clearly of one opinion when you are in reality of another opinion—does not such dissimulation impair one's honesty? Is there not some danger that a lawyer may put on the same mask in common life, in the intercourse with his friends?"

Johnson: "Why, no, sir. Everybody knows you are paid for affecting warmth for your client; and it is therefore properly no dissimulation. The moment you come from the Bar you resume your usual behavior."

This is a pretty extreme statement, perhaps not unmixed with a contemptuous tolerance. At all events, it goes much further than we can follow. But it recognizes the real uncertainties of the law, and of these the lawyer certainly may, and often should, take what advantage he can so long as they remain open.

Once in the trial of a case, or enlisted in the preparation of it, the lawyer's position is very largely settled for him, so far as

concerns matters strictly of law. This, too, is a consideration which the non-professional observer hardly apprehends. The layman, seeing what seems to him the monstrous injustice of the result of some case, outraged by the spectacle of a criminal acquitted, or a meritorious claim defeated, in defiance of his sense of justice, and relying on his own feelings as a final and sufficient test of justice, is not reassured by being told that such is the law. "If this is the law," he says, "all the more I hold responsible the lawyer who has lent himself to bring about such a result by a skilful use of the technicalities of the law. It is a perversion to take advantage of what the law allows, to accomplish what the law should abhor." But this takes no account of the lawyer's relations to a system within which he must act, if he acts at all. The law is a scheme of rules of conduct which the courts enforce—a scheme partly created by enactment of legislatures, partly shaped by the handling of the courts, and to be changed only in the same ways. It may or may not correspond with the moral demands of the individual observer; it may work poorly in particular cases; it is quite possible that it may permit, in this or that combination of circumstances, a result shocking to the moral sense. But this is the system adopted for the business, and adopted because there must be certainty.

Such a system the lawyer is called upon to administer. He is not to be taken to task, generally, for the results which it may produce. It is not always for him a matter of special decision whether to apply the law here and now, nor is his conscience usually to be consulted in the matter. The law, so far as it goes, is his conscience here. In invoking that he is not immoral, he is non-moral—administering a system artificial and positive, for which he is not responsible.

This principle of practice at once puts this part of the lawyer's work largely beyond criticism—the part, that is to say, which is determined wholly by the law. To hold otherwise would require the lawyer to ask, at every moment when he proposed to invoke the law, is the law right? Will it work out right results in this case? Does it conform to the highest moral demands? Such a requirement would override the law;

it would set up the private, special, and varying judgments of individuals in place of that which has been enacted for the very purpose of precluding them.

I have stated this broadly. No doubt some qualifications must be made. I should repudiate the conclusion that the lawyer is to apply the law when he himself feels that it must work an undeniable and flagrant wrong, which no just man could see without revolt. There are human demands which are above professional, and I do not mean to surrender the lawyer's privilege, on which I have already insisted, of choosing what he will be a party to, even among cases which involve law alone without dispute of facts, and of choosing on any grounds which his moral or mental comfort may demand. If this right of choice carries with it some measure of responsibility apparently inconsistent with the theory that the law, once adopted, justifies itself and shelters the practitioner, then it must be so. There is this margin of choice and responsibility surrounding all professional employment, and in that is the final accountability of the man to all ideals of right and wrong, just as there is the initial responsibility of entering at all a profession which has the character it has, and works out such ends by such means. But what I am now insisting on is that professional efforts, so far as concerns matters of law are not directed, and need not be directed, simply to moral ends as such, nor are they ordinarily to be squared by moral judgments in so far as they are occupied with a system which is furnished for them.

It results from this that a lawyer may, without blame, insist on many things for his client which he might think it dishonorable to insist on for himself. I could not refuse, without loss of self-respect, to pay a bill which my doctor had left undemanded for six years; nor repudiate an explicit promise, though made by word of mouth, if relied upon by another person, on the ground that the statute of frauds required writing. Yet if a client insist upon escaping in such cases through positive enactments of law I may aid him to do so, if I like, without responsibility for his unhandsome act; and so I may enforce the harshest contract for the client while

despising the unjust justice of his course. I reserve, however, the right to decline any such employment, and according as I exercise my judgment on such questions my brethren in the profession and my critics out of it are likely to make up their opinion of my general character. At the same time the liberty of applying the law without question must be a wide one.

So much for questions purely of law. Of the lawyer's position in preparing and presenting evidence of facts, so as to favor his client's cause, it is not possible to speak with definiteness, and it must be admitted that here the advocate's task may have many embarrassments. The advocate is not expected to present both sides with impartial emphasis: he is not a judge. No one, whatever his candor, can pretend to try or argue a case so as to give each side its due weight. His general attitude is avowedly partisan; he leaves, and is expected to leave, the urging of counter-views to his opponent. This, in general, will be conceded everywhere. Where to draw the line between fair and unfair advocacy is a thing which no principles will settle but the principles of common honesty, and no special rules can be laid down which would not be almost as varied as the circumstances to which they would apply—at least, I do not see how to lay them down. An argument is usually a partly-wrong statement. The emphasis is laid where it is wanted, favorable features are brought out, unfavorable ones pushed back, the whole is colored to suit a purpose. If this is done grossly we condemn it; if it is done within limits which we think fair we allow it. More than this it is not easy to say, at least short of attempting a treatise.

From a piece of false evidence, or a false statement in argument, every decent lawyer starts back. In offering evidence which is favorable and rejecting that which is unfavorable he selects, with bias it is true, but not without scruple, and with a purpose to get the evidence in, as he believes, truly and not falsely. This he does with more or less care, with more or less effort to get actual truth, and with more or less consideration for his opponent according as his conscience may be sen-

sitive and his nature open and fair. Perhaps all that can be said here is that in these matters, while the advocate is not expected to be as open and candid as in some other relations of life and is entitled to a bias for which due allowance is made, yet he is bound by all the ordinary rules of truth and morality, and to the full extent that these rules control men anywhere. Certainly nothing could be worse than to give any sanction whatever to a theory which, though never avowed may sometimes be tacitly assumed, that the practice of the law is a game, or a species of warfare, in which there may be a few rules agreed to, but in the main there is but one thing to consider, and that is victory. As in the strange, unethical ethics of war you may not use explosive bullets, but may use explosive shells, and may not poison the well in the besieged city, but may destroy the provision train on its way thither, so in a court of law, on this monstrous theory, though you may not actually suborn witnesses, you may take advantage of every piece of falsehood which in any other way can pass in undetected in evidence or argument. But if law is a game, it is a game in which the stakes are human happiness and character; if it is war, it is not a war for plunder, but one for principles, which cannot be set up with glory in the end if they have been first defiled and trampled under foot by the victors.

At last the moralities of the practice of the law must rest on the individual lawyer, and perhaps little more can be said by way of particular rules for professional conduct than that the lawyer is under all the obligations which the highest standard, rightly understood, imposes on any man. From these he neither gets nor claims an exemption by reason of any convention which would permit falsehood, nor by reason of working within a system which, to some extent, settles conduct by general rules of law without regard to the moral aspect of particular cases.

But, it may be asked, what on the whole is the effect of the lawyer's profession on the lawyer? What manner of men does it tend to produce? Does it, as Boswell inquired, "in some degree hurt the nice feeling of honesty"? Is it, as his question implies, laid out on lines which, though they may be

explained and defended, are still always in need of explanation, and so narrowly and nicely run that they are often within a measuring distance of what the common conscience of mankind condemns? If this is so, is it not a demoralizing business? Do not resent the question. If others can ask it, certainly we must answer it; and the answer cannot be doubtful.

In the first place, it must be noticed how small a part of the lawyer's work is advocacy. I have chiefly discussed that because it is the dramatic thing on which public attention is naturally fastened, but in fact, as every lawyer knows, it makes but a small part of the total business of the profession. Many lawyers never touch actual court work; most lawyers take it only as a part of the year's occupation; a few adopt it as their chief business, but even they are not a little occupied outside it. The bulk of the lawyer's work is examining questions, partly of law, partly of fact, for the purpose of giving advice; getting at the real bearings of business entanglements, often so confused that the client cannot even state them; winning, or driving, to comprise conflicting claims, each partly right and partly wrong: entering into domestic and personal embarrassments; leading testators to understand their own minds; drawing contracts, and so on through all the complications and difficulties of human affairs, reaching all confidences and close offices except those of which the physician and the priest take charge, and sometimes not stopping there. How potent the lawyer is as a peace-maker, what a vast proportion of all threatened litigation his hand stays, no one but a lawyer can appreciate. In all this work of the lawyer, or nearly all of it, there is this common element, the entering into other men's embarrassments and needs for the purpose of helping them, and with this go both judgment and sympathy. These characteristics are shared in similar fashion by the three great professions, and this it is which distinguishes them from most other pursuits, however serviceable.

Out of the lawyer's employment there naturally grows a judicial and temperate habit of mind which, in its final effect,

is very different from the partisan tendency which is sometimes attributed to lawyers. In fact, a habit of holding one-sided and biased views is obviously discouraged by the very practice of advocacy. The person whose experience has carried him repeatedly now to one side and now to another, only to be corrected and set right at last by a higher power, and who urges one view well knowing that he may soon be called upon to urge a different one under changed circumstances, is pretty sure to acquire a power of impartial examination and of suspense of judgment. It is by this process that the impartiality of the judge is found to have been sufficiently developed in the training which he has first received in the partiality of the lawyer.

As a final result, therefore, it is by no means prejudice or prepossession which is produced by the lawyer's practice, but rather, I think, a marked degree of open-mindedness and readiness to confront and weigh new views, and this, so far as it goes, favors a truth-loving habit of mind.

That the lawyer's work offers many temptations, and often calls for a nice discrimination between good and evil, is certainly true. Its opportunities for mischief are unsurpassed. While the profession, in the persons of its good members, is a bulwark of society, it is also, in its bad members, a menace, and an intolerable nuisance. No one knows so well as a lawyer what activity for evil goes on in the profession. We have no interest whatever in denying this. Our safety is rather in admitting it. Some considerable part of the daily friction of life, its teasing obstructions, interferences, and petty nuisances, must be laid at the door of lawyers; and of the greater iniquities,—the frauds of trade, the malignant combinations, the perverse and corrupt legislation, the miscarriage of justice,—a fair share is planted, watered, and brought to ripeness with the assistance of lawyers, and when attacked is zealously, and often too successfully, defended by lawyers, and not always by the most obscure. Society finds it among its great dangers that the worst attacks made upon it are often planned with an ingenuity which no other profession can supply. Mr. Bryce, that most indulgent critic of our Ameri-

can institutions, remarks that some judicious American observers hold that a certain decadence in the Bar of the greater cities has been noticeable of late years, and that they declare "that the growth of enormously rich and powerful corporations, willing to pay vast sums for questionable services, has seduced the virtue of some counsel, whose eminence makes their example important."

Against such evils within its own ranks the profession hardly attempts, by any regular discipline, to guard itself. Something is done by way of disbarment, and this is of great value, so far as it goes, in cases of unprofessional conduct which could not be otherwise reached. But I know of no Bar in the country which attempts to purge itself with any thoroughness. The profession cannot undertake to protect society by guaranteeing the moral character of its members. This could hardly be attempted without adopting all the closeness of a guild, and that would not improbably foster and protect more evils than it would prevent. We must be permitted, as a profession, to disclaim responsibility for unworthy members, except to the limited extent that cases of professional misconduct can be dealt with, and the tares and the wheat must, for the most part, grow together until the harvest. The world must make its own discrimination, and perhaps the most that we can do is to encourage publicity, and not to let timidity, or a mistaken feeling of professional pride, hush up what should be openly denounced.

But if there are bad fruits of the profession of the law, what shall we say of its good fruits? Conduct, says Matthew Arnold, is three-fourths of life. With the study of conduct lawyers are always busy, judging men, weighing motives, characterizing actions, publicly attacking or defending what men have done in every situation of life. Out of all this exercise of the sense of right and wrong there must grow a power and habit of discrimination, and of applying principles to acts, a trained attention to conduct as a thing to be answered for, which cannot do otherwise than powerfully affect the moral sense, and, unless by a total perversion they work destruction, they should develop an enlightened and healthy

conscience. So far from destroying the nice sense of honor nothing could bring it to a higher perfection than the constant responsibility of advising men in the difficult places of life what honesty and honor require, and in publicly asserting these great principles both in defence of right and as a terror to evil-doers.

It is always to be borne in mind that however important in ordering our ways a due regard to the scruples of conscience may be, real success in meeting the highest demands of life does not consist chiefly in the most anxious attention to the nicest refinements of such scruples. A man is to be judged even more by his ideals than by his actions, and the test is a far more searching one. So of a profession or a purpose in life. Unless its ideals are positive and inspiring, so high above attainment that they are always drawing us, half in confidence, half in despair, but always irresistibly drawing us on and up, it is nothing but an occupation—harmless, perhaps, useful and even necessary, but still nothing which can hold the great enthusiasms of men, or heat their blood to action, or compel the great sacrifices without which it is appointed that men shall get nothing which they greatly prize.

What the ideals of law and of the profession of it are there is no need to remind this body, where there is no one who does not feel, in his best moments, that his profession has bound him to the service of justice, as a priest in the temple, serving not for pay, nor for public fame, nor for that sweeter reward, the full approval of those who know and can judge, but serving, he knows not why—because he must.

It may seem to some persons that the ministers of justice ought to be something else than the paid advocates of suitors, each pressing his own cause, committed to partial and private views, warped by interest and prejudice, driven sometimes to make the worse appear the better reason, and always striving, as it looks, not for abstract right, but for success for himself and his client.

What more perfect system such theorists may propose I do not know, but this system of ours is the one in which we must do our work, and the wit of man has not yet been able

to devise a better. In this justice does not descend, in answer to our prayers, pure and undefiled from heaven. It is struck out, with pain and sweat and conflict, in the private disputes of men.

Our system is not devised primarily to discover truth, nor is the lawyer chiefly a searcher after truth. If he were, his methods would seem strange, indeed. Our administration of law is made, or rather has grown by forces which are virtually the great forces of nature, to meet human needs, to control the elemental passions of men, to regulate the affairs of life. As these affairs are complicated beyond our understanding by the confusion of the everlasting surging crowd of men, now rough, dishonest, cruel, deceitful above all things and desperately wicked, now honest, unselfish, tender, just, swearing to their own hurt and changing not, so the profession of the law, as it is practised by these same men, has the imperfections and the contradictions of all human things. It does not always conform to rules, however unquestionable and right. It touches all of life and takes on both good and evil by the contact. In its critical moments, when it is centred in a trial in court, it is the modern phase of all ancient strife, the visible struggle, old as the world, of all the passions of anger, hate, greed, and avarice, less wild than of old, but still full of their inherited spirit, and now forced into an arena which, excepting war itself, is left as the only battle-field for the irrepressible fighting instincts of the race.

That these contests should not always proceed in irreproachable methods and infallibly end in right results, is not to be wondered at: that the men who engage in them as trained contestants sometimes fight with indefensible tactics must be laid to traits which yet survive in the human animal.

But on the other hand are there any men to whom society commits with more confidence its dearest interests, both private and public?

The vigorous participation in affairs, with a purpose to do right, is the most wholesome moral tonic that our nature can have. It may not cultivate as many or as nice scruples as the theoretic studies of the casuist; it may dim some of the

splendid visions of the rhapsodist; but for the actual robust work of the world, and for the advancement of high purposes which are not to end in dreams or resolutions but in action, the one appointed way is to go down among men and work. This way lies open in the practice of the law. It cannot be said to be free from perplexities. The practitioner will not find himself in a plain way in which the fool cannot err. But he will find himself in the midst of abundant opportunities for service to mankind, will see before him ideals among the highest which our minds can reach, and will have the encouragement of examples which are not behind the farthest mark that human nature has touched in its approach to justice.

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DISCUSSIONS.

"ASPECTS OF THE SOCIAL PROBLEM:" A REPLY.

THOUGH I am unable to admit the faults laid to my charge by Mr. Webb, I should like to say a few words to the readers of this JOURNAL as an acknowledgment of his attempt to find a platform for discussion. We are speaking to an audience which includes those, in many countries, who care most for progress, and on the highest grounds. I should wish, if I can be granted space, to put before them the reasons for the method of argument which I adopt, and the nature of the difficulties found in coming to an understanding; difficulties for which I cannot blame myself, excepting as regards deficient power to carry out my method adequately.

1. This discussion began with Mr. Ball's criticism of the book "Aspects of the Social Problem," of which I was editor and partly author. I think that any reader, fresh from the study of the charges made against that work in this JOURNAL, will be a good deal surprised if he turns to the book itself. The principal passage of comment upon Socialism, which occupies by no means a large portion of the book, is on pp. 305–6. I had almost asked the editor to let me reprint it at length, but, on reflection, I can hardly expect to fill the pages of this JOURNAL with extracts from my own works. The whole passage simply *is* a very careful discrimination between differ-